

**Rule 23, Ariz. R. Crim. P.**

**LESSER-INCLUDED OFFENSES: Jurors should be instructed that they may consider lesser-included offenses if after reasonable efforts they are unable to agree on whether to acquit the defendant of the charged crime.....Revised 3/2010**

Arizona law once required jurors to acquit a defendant on the charged offense before the jury could consider any lesser-included offenses. See *State v. Wussler*, 139 Ariz. 428, 430, 679 P.2d 74, 76 (1984), *disapproved by State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996). However, the current rule is that the jury should be instructed that they may consider the lesser charge after making reasonable, but unsuccessful, efforts to agree on the greater charge. In *LeBlanc*, 186 Ariz. at 438, 927 P.2d at 442, the Arizona Supreme Court stated:

It now appears that requiring a jury to do no more than use reasonable efforts to reach a verdict on the charged offense is the better practice and more fully serves the interests of justice and the parties. Under this method, jurors may render a verdict on a lesser-included offense if, after full and careful consideration of the evidence, they are unable to reach agreement with respect to the charged crime. Thus, the jury may deliberate on a lesser offense if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge.

The Court reasoned that the “reasonable efforts” rule was superior to the “acquit first” requirement for several reasons. First, the “reasonable efforts” rule would reduce the “risks of false unanimity and coerced verdicts.” That is, the Court feared that under the “acquit first” rule, a juror with a doubt as to the defendant’s guilt on the greater charge, but convinced that the defendant was guilty to a lesser degree, might “vote for conviction on the principal charge out of fear that to do otherwise would permit a guilty person to go free.” *Id.* Further, the “reasonable efforts” rule would reduce the likelihood of a hung jury by allowing the jury to “better gauge the fit between the state’s proof and the offenses being considered.” *Id.* Finally, the State’s interests would be served by the

“reasonable efforts” rule because it would mandate that the jury “give diligent consideration to the most serious crime first.” *Id.* at 439, 924 P.2d at 443. Nevertheless, the *LeBlanc* Court cautioned that the “acquit first” requirement was constitutional and that giving such an instruction would not be fundamental error. *Id.* at 440, 924 P.2d at 444.